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NO. 93-7407

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT O'NEAL,

Petitioner,

v.

FRED McANINCH, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. ON FEDERAL HABEAS REVIEW OF A STATE CONVICTION, WHICH PARTY HAS THE BURDEN OF PROVING THAT ANY ERROR IDENTIFIED BY THE HABEAS PETITIONER "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" UNDER *BRECHT v. ABRAHAMSON*, 113 S. Ct. 1710 (1993)?

II. DID THE ERRORS PETITIONER ALLEGES TO HAVE OCCURRED IN THIS CASE HAVE A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" SUCH AS TO ENTITLE HIM TO FEDERAL HABEAS RELIEF FROM HIS STATE CONVICTIONS FOR AGGRAVATED MURDER, KIDNAPPING, AND AGGRAVATED ROBBERY?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATUTORY PROVISION AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. UNDER *BRECHT v. ABRAHAMSON*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE HABEAS PETITIONER . . . 9

A. The Court's Decision in *Brecht* 10

B. Subsequent Application of *Brecht* by the Courts and the Congressional Response 14

II. UNDER THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE PARTY SEEKING TO SET ASIDE THE JUDGMENT ON APPELLATE REVIEW 19

A. The Historical Background to Federal Appellate Review of Trial Judgments 20

B. The Decision and Rationale in *Kotteakos* 25

C. Subsequent Application of *Kotteakos* 30

III. THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT* IS APPROPRIATE ON COLLATERAL FEDERAL REVIEW OF STATE JUDGMENTS BECAUSE IT REQUIRES THE HABEAS PETITIONER TO SHOW THAT ALLEGED ERROR JUSTIFIES REVERSAL OF THE CONVICTION 32

A. Habeas Corpus Review Under Section 2254 Occurs in a Civil Action and Thus It Is Proper for Petitioner to Bear the Burden of Showing that the Conviction Warrants Reversal 33

B. The Nature and Purpose of Collateral Habeas Corpus Review Warrants the Application of Different Rules than on Direct Review 36

C. The Traditional Safeguards Noted in *Brecht* Suffice to Protect the Historical Role Fulfilled by the Writ of Habeas Corpus 44

IV. THE ERRORS ALLEGED BY PETITIONER IN THIS CASE DID NOT HAVE "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" SO AS TO ENTITLE HIM TO FEDERAL HABEAS RELIEF FROM HIS STATE CONVICTIONS 46

CONCLUSION 50

APPENDIX A-1

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. United States,
317 U.S. 269 (1943) 24
Addonizio v. United States,
442 U.S. 178 (1979) 38, 41
Andrews v. Olin Mathieson Chem. Corp.,
334 F.2d 422 (8th Cir. 1964) 32
Arizona v. Fulminante,
499 U.S. 279 (1991) 14, 29
Armstrong v. United States,
16 F.2d 62 (9th Cir. 1926), *cert. denied*,
273 U.S. 766 (1927) 22
Baker v. United States,
156 F.2d 386 (5th Cir.), *cert. denied*,
329 U.S. 763 (1946) 30
Berger v. United States,
295 U.S. 78 (1935) 23
Bibbins v. Dalsheim,
21 F.3d 13 (2d Cir. 1994) 16
Boyde v. California,
494 U.S. 370 (1990) 46, 50
Brecht v. Abrahamson,
113 S. Ct. 1710 (1993) . . . . . *passim*
Browder v. Director, Ill. Dep't of Corrections,
434 U.S. 257 (1978) 33, 34
Buchalter v. New York,
319 U.S. 427 (1943) 25
Burks v. Borg,
1994 U.S. App. LEXIS 16019
(9th Cir. June 27, 1994) 17
Chapman v. California,
386 U.S. 18 (1967) . . . . . *passim*

TABLE OF AUTHORITIES (cont'd.)

CASES	PAGE
Creekmore v. Crossno, 259 F.2d 697 (10th Cir. 1958)	36
Cumbie v. Singletary, 991 F.2d 715 (11th Cir.), *cert. denied*, 114 S. Ct. 650 (1993)	16
Cunningham v. Mitchell, 374 F.2d 356 (5th Cir. 1967)	32
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	48
Doyle v. Ohio, 426 U.S. 610 (1976)	10
Duckworth v. Eagan, 492 U.S. 195 (1989)	42
Engle v. Isaac, 456 U.S. 107 (1982)	*passim*
Erskine v. Consolidated Rail Corp., 814 F.2d 266 (6th Cir. 1987)	31
Estelle v. McGuire, 112 S. Ct. 475 (1991)	46
Fisher v. Baker, 203 U.S. 174 (1906)	33
Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981)	36
Gillian v. City of Omaha, 524 F.2d 1013 (8th Cir. 1975)	32
Harris v. Nelson, 394 U.S. 286 (1969)	33, 34
Hawk v. Olson, 326 U.S. 271 (1945)	37

TABLE OF AUTHORITIES (cont'd.)

CASES	PAGE
Haywood v. United States, 268 F. 795 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921)	22
Henderson v. Kibbe, 431 U.S. 145 (1977)	50
Henry v. Estelle, 993 F.2d 1423 (9th Cir. 1993)	16
Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1981)	35
Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994)	15
Johnson v. Zerbst, 304 U.S. 458 (1938)	37
Kotteakos v. United States, 328 U.S. 750 (1946)	*passim*
Lowery v. Collins, 996 F.2d 770 (5th Cir. 1993)	15
McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982)	34
McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984)	31, 35
Miranda v. Arizona, 384 U.S. 436 (1966)	10
Morgan v. United States, 98 F.2d 473 (8th Cir.), *cert. denied*, 305 U.S. 648 (1938)	23
Murray v. Carrier, 477 U.S. 478 (1986)	43

TABLE OF AUTHORITIES (cont'd.)

CASES **PAGE**

Myres v. United States,
174 F.2d 329 (8th Cir.), *cert. denied*,
338 U.S. 849 (1949) 30
O'Neal v. Morris,
3 F.3d 143 (6th Cir. 1993),
cert. granted sub. nom. O'Neal v. McAninch,
114 S. Ct. 1396 (1994) . . . . . *passim*
Ortiz v. Dubois,
19 F.3d 708 (1st Cir. 1994) 15
Palmer v. Hoffman,
318 U.S. 109 (1943) 24, 33, 36
Pulley v. United States,
253 F.2d 796 (8th Cir. 1958) 30
Robinson v. Arvonio,
1994 U.S. App. LEXIS 14683
(3d Cir. June 15, 1994) 15
Sanders v. United States,
373 U.S. 1 (1963) 38
Segal v. Cook,
329 F.2d 278 (6th Cir. 1964) 32
Shuman v. United States,
16 F.2d 457 (5th Cir. 1927) 23
Smith v. Dixon,
14 F.3d 956 (4th Cir. 1994) (en banc) 16
State v. Lockett,
49 Ohio St. 2d 48 (1976) 4
State v. Scott,
61 Ohio St. 2d 155 (1980) 4
Stoner v. Sowders,
997 F.2d 209 (6th Cir. 1993) 15

TABLE OF AUTHORITIES (cont'd.)

CASES **PAGE**

Tague v. Richards,
3 F.3d 1133 (7th Cir. 1993) 17
Teague v. Lane,
489 U.S. 288 (1989) 33, 37
Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248 (1981) 36
United States v. Bagley,
473 U.S. 667 (1985) 11
United States v. Frady,
456 U.S. 152 (1982) . . . . . *passim*
United States v. Lane,
474 U.S. 438 (1986) 13, 28, 30
United States v. Mechanik,
475 U.S. 66 (1986) 40
United States v. Montoya,
827 F.2d 143 (7th Cir. 1987) 30
United v. Olano,
113 S. Ct. 1770 (1993) 35
Valli v. United States,
94 F.2d 687 (1st Cir.), *cert. dismissed*,
304 U.S. 586 (1938) 23
Wainwright v. Sykes,
433 U.S. 72 (1977) 40
Wells v. United States,
158 F.2d 932 (5th Cir. 1946), *cert. denied*,
330 U.S. 827 (1947) 30
Westwood Chem., Inc. v. Owens-Corning
Fiberglas Corp., 445 F.2d 911 (6th Cir. 1971),
cert. denied, 405 U.S. 917 (1972) 36

TABLE OF AUTHORITIES (cont'd.)

CASES **PAGE**

Withrow v. Williams,
113 S. Ct. 1745 (1993) 41
Younger v. Harris,
401 U.S. 37 (1971) 39

STATUTES AND RULES:

28 U.S.C. §391 . . . . . 20, 24, 25
28 U.S.C. §2211 . . . . . *passim*
28 U.S.C. §2254 . . . . . *passim*
28 U.S.C. §2255 . . . . . *passim*
Rule 11, 28 U.S.C. foll. §2254 . . . . . 8, 34
Federal Civil Rule 61 . . . . . 8, 35
Federal Civil Rule 81 34
Federal Criminal Rule 52 35

LEGISLATIVE MATERIALS

48 Cong. Rec. 11,770 (1912)
(statement of Sen. Root) 27
48 Cong. Rec. 11,774 (1912)
(statement of Sen. Poindexter) 40
H.R. 4018, 103d Cong., 2d Sess. (1994) 17, 18
H.R. Rep. No. 470, 103d Cong., 2d Sess. (1994) . . 18
H.R. Rep. No. 611, 62d Cong., 2d Sess. (1912) . . . 27
H.R. Rep. No. 913, 65th Cong., 3d Sess. (1946) . 27, 28
H.R. Rep. No. 1949, 61st Cong., 3d Sess. (1911) . . 27
S. 1441, 103d Cong., 1st Sess (1993) 17
S. 1657, 103d Cong., 1st Sess. (1993) 17

MISCELLANEOUS

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,
76 Harv. L. Rev. 441 (1963) 38
Steven Alan Childress & Martha S. Davis,
Federal Standards of Review (2d ed. 1992) 43
Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,
38 U. Chi. L. Rev. 142 (1970) 39
Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*,
11 A.B.A.J. 217 (1925) 21
Edson R. Sunderland, *The Problem of Appellate Review*,
5 Tex. L. Rev. 126 (1927) 20
William Howard Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1 (1905) 27
Larry W. Yackle, *Postconviction Remedies* (1981) . . 37

STATUTORY PROVISION AND RULES INVOLVED

The statutory provision and rules involved -- 28 U.S.C. §2254; capital rule 11, 28 U.S.C. foll. §2254; Fed. R. Civ. P. 61 -- are set forth in full in the capital appendix.

STATEMENT OF THE CASE

On October 10, 1981, a jury convicted Petitioner Robert O'Neal of aggravated murder, kidnapping, and aggravated robbery, and he was sentenced to life in prison. The convictions resulted from Petitioner's actions undertaken as part of "a detailed conspiracy" to kidnap, rob, and murder Henry Podborny. *O'Neal v. Morris*, 3 F.3d 143, 144 (6th Cir. 1993).

After the conspirators had considered a number of plots over a period of several months with Petitioner's full involvement, they determined to lure Henry to Cleveland from his home in Chicago, where Petitioner would kidnap him and hold him in the basement of his unlicensed saloon while his co-conspirators robbed Henry's home and business. Tr. 1807, 1818, 1820, 1851; J.A. 9-13. Henry arrived in Cleveland on January 29, 1981, and was driven to Petitioner's saloon. As prearranged with Petitioner, the driver then waited down the block until, a few minutes later, Petitioner and a fellow conspirator met her and Petitioner gave her Henry's personal belongings. Henry was never seen alive again. Tr. 1858-59; J.A. 13-15, 107-09.

Petitioner and three others were arrested in March of 1981. Petitioner received *Miranda* warnings and then made a statement implicating himself in the kidnapping and robbery, but denying that he had murdered Henry. Tr. 4464-65; J.A. 42-43. On April 2, 1981, Petitioner was visited at the jail by a friend. Henry's body had not yet been

found, but Petitioner told his friend that he and another man had killed Henry and had placed the body in a covering in the field next to the friend's apartment building. Petitioner asked his friend to cover up the body to prevent it from being discovered. The friend did not comply with this request, but a few weeks later accompanied a city health inspector, who was responding to complaints of a stench in the area, to the field where Henry's body was finally found on April 24, 1981. Tr. 3724-28; J.A. 27-32, 109-111.

It was undisputed that Henry's death was caused by five blows on the head with a blunt instrument and a .38 caliber bullet to the head. Tr. 3708, 3710-13, 3984-85; J.A. 35-36. Just weeks before Henry was killed, Petitioner had recovered a .38 caliber gun that had been confiscated from him previously after an incident in which he shot and killed another man; the evidence showed that this revolver was one of only six kinds of weapon that could have fired the bullet that killed Henry. Tr. 3984-85, 4051, 4845; J.A. 35-37, 44-45.

Petitioner was tried jointly with two of his co-conspirators in state court and convicted of aggravated murder, kidnapping, and aggravated robbery. The evidence of his guilt included:

1. Testimony by the co-conspirator who had driven Henry to Petitioner's saloon. She testified that Petitioner had been actively involved in the plot, that after she left Henry with him, Petitioner had emerged and given her Petitioner's personal effects, and that Petitioner continuously sought to extort money from her over the next two months for his supposedly keeping charge of Henry. Tr. 1855-59; J.A. 156.

2. Testimony by a police officer that Petitioner and a co-conspirator both told him they had been present when Henry arrived at the saloon and confirmed that Petitioner had left the saloon minutes later with Henry's personal effects. Tr. 4446, 4464-65; J.A. 156.

3. Testimony by Petitioner's friend that Petitioner told him where Henry's body was located weeks before it was found there, and asked for his help in concealing the corpse. This testimony also placed Petitioner and a co-conspirator a mere twelve feet from that spot earlier in the winter, and related how Petitioner had lied in order to induce the friend to leave that location. Tr. 3730-33; J.A. 159.

4. Physical evidence, including blood and paint samples, linked Henry's body to Petitioner's saloon, where Henry concededly was killed. In addition, Henry's body was found wrapped in a green covering similar to one that was missing from the pool table from Petitioner's saloon. When Henry's body was found, he had been dead for many weeks. Tr. 3653, 3665, 3676-78, 3684-86, 3693, 3701, 3712, 5841; J.A. 23-27, 157.

5. Petitioner testified and recounted how he had used money obtained from his co-conspirators to recover his .38 caliber gun. (The gun had been confiscated after an incident in which Petitioner killed another man, though charges were dropped after Petitioner's friends claimed that the killing was unintentional.) He described his meetings with the co-conspirators as "social occasions," denounced their testimony as "damn lies," and claimed that the police had lied about his statements and roughed him up, though he later contradicted the latter claim. Petitioner's theory of the crimes was that the others had kidnapped and killed Henry in Petitioner's saloon without his knowledge. Tr. 4863-65, 4872, 4892, 4908, 4911-12, 4917-18, 4926, 5840-43; J.A. 45-51, 160-61.

Petitioner was sentenced to life in prison for aggravated murder, and to consecutive terms of 7-25 years each for kidnapping and aggravated robbery.

Petitioner appealed his conviction, claiming among other things that the trial court's instructions to the jury on complicity and conspiracy had deprived him of a fair trial. On July 25, 1985, a state appeals court affirmed, rejecting Petitioner's claims and holding that the challenged instructions were in accord with Ohio law. J.A. 83-98. The Ohio Supreme Court denied leave to appeal on January 29, 1986.

Petitioner then sought a writ of habeas corpus pursuant to 28 U.S.C. §2254. He raised five grounds for relief, including the claim that even though all the evidence adduced at trial tended to demonstrate his guilt as a principal in the murder of Henry Podborny, he was denied due process of law by jury instructions and continued reference to the intent necessary to convict an aider and abettor.

The actual jury instructions properly noted that aggravated murder "is the killing of another purposely and with prior calculation and design." J.A. 169; *O'Neal*, 3 F.3d at 147 n.3. They also properly instructed, as held in *State v. Scott*, 61 Ohio St. 2d 155, 165 (1980), and *State v. Lockett*, 49 Ohio St. 2d 48, 59-60 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586 (1978), that under Ohio criminal law:

> ... where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or [sic; reasonably] likely to produce the

> death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

J.A. 170. The jury instructions given on the other charges were similarly proper. Petitioner contended that the instructions may have confused the jury into finding him guilty without finding intent or mens rea because one further passage said that the jury must find "there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent." J.A. 170.

A federal magistrate agreed with Petitioner's claim and recommended that the writ be granted. J.A. 123-31. The magistrate also held that Petitioner had been denied a fair trial because relevant evidence had been admitted that was unduly prejudicial and cumulative, J.A. 132-39, a determination no longer at issue here. In so ruling, the magistrate stated that error could not be harmless unless the entire record revealed overwhelming evidence of guilt. J.A. 155, 160. On June 26, 1992, the magistrate's report was adopted by the district court. J.A. 213-14.

On appeal, the Sixth Circuit unanimously reversed. *O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). It held, first, that the challenged jury instructions were not erroneous:

> ... when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors."

Id. at 146; *see also id.* at 146-47 (instruction, though "not ideal," nonetheless "captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court").

The court went on, however, to consider whether these instructions, combined with improper comments made by the prosecutor in closing argument, warranted habeas relief.[1] The court simply assumed, *arguendo*, that error had occurred, but found that any such errors "were not of such magnitude that they 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 147 (*quoting Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993)). Although Petitioner contended that the alleged errors might have caused the jury to find him guilty as an accomplice or conspirator without finding intent, the actual instructions, coupled with "all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." 3 F.3d at 147 & n.3. The Sixth Circuit therefore denied habeas relief.

Rehearing was denied, and this Court granted certiorari on April 4, 1994. Although Petitioner had raised the issue of whether *Chapman v. California*, 386 U.S. 18 (1967) should be applied in this case rather than *Brecht*, the Court limited its grant of certiorari to the issue of which side bears the burden of proof under *Brecht* in cases brought on federal habeas review. *See O'Neal v. McAninch*, 114 S. Ct. 1396 (1994); Petition for Writ of Certiorari at 6-9.

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[1] The prosecutor's statement in closing argument was that the State must prove two things: "First, the crimes alleged have been committed.... The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." J.A. 58.

SUMMARY OF ARGUMENT

1. The Court has recently held that on federal habeas review of state convictions, the proper standard for determining whether any alleged error should result in reversal of the petitioner's state conviction is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). The Court thus adopted a standard that had been in existence for decades. *See Kotteakos v. United States*, 328 U.S. 750 (1946). In explicating that standard, the Court stated in *Brecht* that the burden of showing that an alleged error "had substantial and injurious effect or influence in determining the jury's verdict" so as to warrant reversal rests upon the habeas petitioner. This formulation of the proper standard on collateral review has generally been applied without difficulty by the lower courts, and has been recognized and considered also by the Congress.

2. The Court's formulation in *Brecht* of the standard for determining when alleged errors warrant reversal of a judgment is consistent with the historical background of appellate review in the federal courts. The ordinary formulation places upon the party seeking to reverse a judgment the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This formulation of the standard of review is faithful to the general tenor of decisions both before and after *Kotteakos*. The sole exception to this general approach has been the distinct standard of review adopted from *Chapman v. California*, 386 U.S. 18 (1967), which the Court in *Brecht* explicitly rejected for federal habeas proceedings.

3. The *Brecht* standard for determining when alleged errors warrant reversal of a judgment is especially

appropriate on federal habeas review of state convictions under 28 U.S.C. §2254.

a. Habeas corpus actions brought under 28 U.S.C. §2254 are civil actions, as the Court has long recognized. But the established approach to harmless-error review in civil actions, under *Kotteakos* and similar cases, is that the party seeking to reverse a judgment bears the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This is the approach taken under Federal Civil Rule 61, in particular, which is made applicable to federal habeas actions by Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254, and thus governs this case.

b. In addition, as the Court has emphasized in *Brecht* and many other cases, finality concerns, special considerations of comity, and the social costs of belated retrials are all implicated by collateral habeas review, especially by federal challenges to state convictions. *See Engle v. Isaac*, 456 U.S. 107 (1982); *United States v. Frady*, 456 U.S. 152 (1982). These special problems justify the Court's view that a habeas petitioner must clear a significantly higher hurdle than would exist on direct appeal, consistent with the central interest in assuring the reliability of the criminal process. This sensible distinction is faithfully captured in the differences between the *Chapman* and *Brecht* standards, including their respective allocations of the burden of showing that alleged errors have had a sufficient effect on the jury's verdict to justify reversal of a presumptively valid conviction.

c. At the same time, the specific safeguards noted in *Brecht* -- including application of the *Chapman* standard on direct appeal, the requisite careful examination of the whole record on collateral review, and faithful application of

the *Kotteakos* formulation rather than a simplistic assessment of probable guilt -- suffice to protect the traditional role fulfilled by the writ of habeas corpus.

4. In this case, for example, the errors alleged by Petitioner here are the combined effects of a challenged jury instruction and a comment made by the prosecutor during closing argument. These alleged errors are said to have confused the jury about whether it had to find that Petitioner had intent to commit the crimes charged in order to convict him. Yet faithful application of the *Kotteakos* standard on review of the full record shows that Petitioner's convictions should be affirmed. In view of the evidence at trial, the theory of the case presented by the prosecution, the complete set of instructions given to the jury, and the likely minimal effect of any arguably improper comment set against the full record here, it appears that any alleged error would not have had "substantial and injurious effect or influence in determining the jury's verdict."

ARGUMENT

I. UNDER *BRECHT v. ABRAHAMSON*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE HABEAS PETITIONER

In *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), the Court addressed the question of how the courts should determine in federal habeas proceedings when alleged error warrants reversal of a state conviction. In resolving this issue, the Court chose between *Chapman v. California*, 386 U.S. 18 (1967), which imposes a less stringent standard to justify reversal and places the burden of proof upon the

State, and *Kotteakos v. United States*, 328 U.S. 750 (1946), which imposes a more stringent standard and places the burden on the party seeking to set aside a conviction. In opting for the latter, the Court exercised its traditional authority to fill gaps in federal habeas law by adopting an approach consistent with the view that a habeas petitioner must clear a significantly higher hurdle than exists on direct review.

A. The Court's Decision in *Brecht*

In *Brecht*, the Court considered and determined what standard of review should apply "in determining whether habeas relief must be granted because of constitutional error of the trial type." 113 S. Ct. at 1722. In *Brecht* the Court confronted this issue in the particular context of allegedly erroneous references by the prosecutor to the defendant's post-*Miranda* silence, *see Doyle v. Ohio*, 426 U.S. 610 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966), but the Court's holding was not so limited. Instead, the Court spoke generally in addressing and resolving the broader theoretical issue of when a habeas petitioner establishes an entitlement to relief based on claims of trial error.

The Court noted that it had applied the approach set forth in *Chapman* "in a handful of federal habeas cases," but had yet "squarely to address its applicability on collateral review." 113 S. Ct. at 1718. Under the *Chapman* standard, a valid claim of federal constitutional error mandates reversal of the underlying conviction unless it is shown to be "'harmless beyond a reasonable doubt,'" and that standard requires the State to bear the burden of proof to make the necessary showing. *Id.* at 1717 (*quoting Chapman*, 386 U.S. at 24). The *Chapman* standard has generally been applied to evaluate the effect upon the verdict of constitutional claims raised on direct review of criminal cases in both the state and

federal courts. *See, e.g., Chapman; United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

In *Brecht*, however, the Court rejected application of the *Chapman* standard to constitutional trial errors raised in federal habeas proceedings. The Court noted that it was obliged to exercise its traditional authority to fill "the gaps of the habeas corpus statutes." 113 S. Ct. at 1719. In doing so, the Court emphasized, in particular, the settled "principle that collateral review is different from direct review," *id.*, and noted that "the writ of habeas corpus has historically been regarded as an extraordinary remedy." *Id.* (*citing Engle v. Isaac*, 456 U.S. 107, 126 (1982)). The States have a strong interest "in the finality of convictions that have survived direct review within the state court system," and serious concerns of comity and federalism arise also with collateral federal habeas review of state judgments, which fosters and often requires relitigation of state criminal trials many years after the underlying events have faded from memory. 113 S. Ct. at 1720-21. Thus, the Court decided that it would be sensible to recognize that "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 1720 (*quoting United States v. Frady*, 456 U.S. 152, 165 (1982)) (internal quote omitted).[2]

The Court implemented these concerns by adopting instead a "less onerous standard on habeas review of constitutional error," which it determined should be the *Kotteakos* test of "whether the error 'had substantial and injurious effect or influence in determining the jury's

[2] The Court observed also that "in an unusual case, a deliberate and egregious error of the trial type" could warrant reversal without more. *Brecht*, 113 S. Ct. at 1722 n.9. No such deliberate and unusually egregious error is alleged or exists in this case.

verdict.'" 113 S. Ct. at 1722 (*quoting Kotteakos*, 328 U.S. at 776). The Court recognized that up to this point, "we have limited [the *Kotteakos* standard's] application to claims of nonconstitutional error," but determined nonetheless that it should now be held to apply to claims of constitutional trial error that are raised on collateral habeas review. 113 S. Ct. at 1718, 1722.

In explaining this approach, the Court stated: "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 113 S. Ct. at 1722 (*citing United States v. Lane*, 474 U.S. 438, 449 (1986)) (emphasis added). This statement clearly imposes the burden of proof upon the habeas petitioner to show that alleged error had substantial and injurious effect in determining the jury's adverse verdict. *See also* 113 S. Ct. at 1727 (White, J., dissenting) ("the Court now invokes *Kotteakos* ... to impose on the defendant the burden of establishing that the error "'resulted in actual prejudice'"). In addition, the Court noted that "because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. §2111), federal courts may turn to an existing body of case law in applying it." *Id.* at 1722.

Applying that standard, the Court examined "the record as a whole" and determined that the petitioner was not entitled to habeas relief. 113 S. Ct. at 1722. The alleged error was found to be incidental and cumulative in light of the complete trial record, the evidence of guilt "was, if not overwhelming, certainly weighty," and so it appeared that the alleged error would not have had "substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Petitioner has suggested here that the formulation of the *Chapman* standard rejected in *Brecht* can somehow be separated from its subsidiary determination of which party bears the burden of proof under that standard, and that in *Brecht* the Court departed only from the former but not the latter. Brief for Petitioner at 17. The suggestion is incorrect. It is clear from *Brecht* and from *Chapman* itself that the formulation of the *Chapman* standard includes, and cannot be divorced from, an understanding under that standard about which party bears the burden of proof. Thus the claim that the Court's references in *Brecht* to the *Chapman* "standard" have nothing to do with the intertwined concept of where that standard allocates the burden of proof is incorrect. It also cannot be squared with the passage quoted above, in which the Court expressly provided that under the *Kotteakos* standard, the habeas petitioner bears the burden of establishing an entitlement to the relief sought. 113 S. Ct. at 1722. Justice White, in dissent, expressed the same understanding of how the Court's adoption of the *Kotteakos* standard resolved the burden-of-proof issue. *See id.* at 1727 (White, J., dissenting).

In a separate concurrence, Justice Stevens offered several observations about the *Kotteakos* standard. "Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record." 113 S. Ct. at 1724 (Stevens, J., concurring). Moreover, under *Kotteakos*, the relevant inquiry is not whether the jury's verdict was correct, but instead whether it was substantially influenced by the alleged error. *Id.* He also cautioned the lower courts that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Id.* at 1725.

Justice Stevens also stated his view, however, that unless errors are merely "technical" in nature, the prosecution must

bear the burden of sustaining a verdict, rather than the habeas petitioner bearing the burden of showing an entitlement to relief. He read *Kotteakos* as providing that the issue of whether error is merely technical turns on whether it can be shown that the effect of the error "'is to prejudice a litigant's substantial rights.'" 113 S. Ct. at 1723 (Stevens, J., concurring) (*quoting Kotteakos*, 328 U.S. at 760-61). Yet Justice Stevens did not believe that *Kotteakos* would require the complaining party to make any such showing with respect to the kinds of trial errors raised in federal habeas proceedings. In Justice Stevens' view, for example, constitutional errors always tend to prejudice a litigant's substantial rights, and thus the burden of proof would fall upon the prosecution, without regard to whether the errors alleged were "trial errors" or not. 113 S. Ct. at 1723-24. This view thus might appear to import some portion of a *Chapman*-type analysis into the *Kotteakos* framework.[3] None of the dissenters appeared to subscribe to this approach. *See id.* at 1727 (White, J., dissenting) (petitioner bears burden of proof under the *Kotteakos* standard); *id.* at 1731 (O'Connor, J., dissenting) (expressing no view on the burden-of-proof issue).

B. Subsequent Application of *Brecht* by the Courts and the Congressional Response

For the most part, the lower federal courts have faithfully applied *Brecht* to place the burden on the habeas petitioner to

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[3] In contrast, Justice White noted in dissent that the trend in the Court's recent cases has been to categorize errors in habeas proceedings only for the purpose of distinguishing between "trial errors" subject to review for prejudice to the petitioner's substantial rights and "structural defects" that necessitate reversal by presuming such effect. *Brecht*, 113 S. Ct. at 1727 n.* (White, J., dissenting) (*citing Arizona v. Fulminante*, 499 U.S. 279 (1991)).

prove that alleged error had "substantial or injurious effect or influence on the jury's verdict." 113 S. Ct. at 1718. Although some courts have ignored *Brecht*'s express statement on the burden-of-proof issue,[4] most have had no difficulty understanding or applying *Brecht*, and thus the fair administration of the *Brecht* approach provides no cause to abandon or rewrite it at this juncture.

For example, in *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994), the court considered a claim of alleged juror misconduct during a state criminal trial. Finding error, the court then applied the new *Brecht* standard to determine whether habeas relief was warranted, which it viewed as requiring petitioners to bear the burden of proof. "Although petitioners now face a greater burden, it would be wrong to assume that federal collateral review has lost much of its force." *Id.* at 1190. The court conducted a careful review of the record as prescribed in *Brecht*, and vacated and remanded to the trial court. *Id.* at 1190-91.

In *Robinson v. Arvonio*, 1994 U.S. App. LEXIS 14683 (3d Cir. June 15, 1994), by contrast, the court denied habeas relief based on *Brecht*. There the court found error in the introduction of some perjured testimony, but determined that the error did not have substantial effect on the jury's verdict. It considered the circumstances surrounding the error, canvassed the record to determine what the jury knew and how that knowledge might have been affected by the testimony, and assessed the further effect of tactical

[4] Even in the few cases that have not applied *Brecht*'s allocation of the burden of proof, it does not appear that the result has hinged on that point, whether relief was granted or denied. *Ortiz v. Dubois*, 19 F.3d 708, 715 (1st Cir. 1994); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993); *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir. 1993).

maneuvers engaged in by the prosecution and defense counsel. *Id.* at *19-*30. *See also Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994) (en banc).[5]

Finally, in *Cumbie v. Singletary*, 991 F.2d 715 (11th Cir.), *cert. denied*, 114 S. Ct. 650 (1993), the court also applied the new *Brecht* rule "applicable to federal habeas corpus cases alleging state court trial error," including its allocation of the burden of proof to the petitioner. *Id.* at 724. Having found that the petitioner's confrontation rights were violated, the court went on to assess the evidence presented in the case and to hold that actual prejudice was established. It thus granted a new trial on charges of sexually assaulting a child. *See also Henry v. Estelle*, 993 F.2d 1423, 1426-28 (9th Cir. 1993) (applying *Brecht* standard and burden of proof; writ granted).

These cases are exemplary of the approach taken by the lower courts in the wake of *Brecht*. The more specific and confined nature of the *Kotteakos* inquiry has improved the sharpness of the courts' analysis and has given clearer guidance about what is important in assessing the effects of alleged error.[6] It is significant in this connection that the

[5] Surprisingly, although amicus Timothy Scott Sherman states his interest in preserving favorable law in the Fourth Circuit, where his case is pending, he does not mention the contrary *en banc* ruling in *Dixon*. All of the judges currently active on the full court joined in its holding on the *Brecht* burden-of-proof issue; one senior judge dissented.

[6] In this respect, the more focused nature of the inquiry under *Brecht* and *Kotteakos*, directed as it is to the effect or influence of alleged error on the jury's verdict, would seem better to serve the concerns stated by Justice O'Connor in dissent in *Brecht*, that the applicable standard should advance "our faith in the reliability of the criminal process." 113 S. Ct. at 1728-29 (O'Connor, J., dissenting).

lower courts are closely heeding two of the cautionary admonitions that Justice Stevens laid down in his *Brecht* concurrence:

> (1) that courts must engage in a careful and "*de novo* examination" of the "entire trial record" to determine whether alleged error "had substantial and injurious effect" on the verdict;
>
> (2) that the proper inquiry is not whether the evidence tends to show that the petitioner committed the crime, or even whether the court "thinks the petitioner would have been convicted" without the alleged error, but instead whether such error did or did not "influence the jury" in reaching its verdict.

113 S. Ct. at 1724 (Stevens, J., concurring). *See also, e.g., Burks v. Borg*, 1994 U.S. App. LEXIS 16019 (9th Cir. June 27, 1994); *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993). The *Brecht* standard, therefore -- including its allocation of the burden of proof to the habeas petitioner to show that alleged error warrants reversal of the conviction -- is operating well in practice and does not require reworking at this point.

Likewise, the Congress has expressed a clear understanding that under *Brecht*, the burden of demonstrating that alleged error warrants reversal of a state conviction rests upon the habeas petitioner. Three bills have been introduced that would expressly amend the language of 28 U.S.C. §2254(a) to overturn *Brecht*'s holding on this point and assign the burden of proof to the State. *See* S. 1441, 103d Cong., 1st Sess. §4(b) (1993) ("the State shall bear the burden of proving harmlessness"); S. 1657, 103d Cong., 1st Sess. §304(b) (1993) (same); H.R. 4018, 103d Cong., 2d Sess. §8 (1994) (court shall award relief unless "the

respondent shows that the error was harmless beyond a reasonable doubt"). The Congress, of course, can certainly exercise its power to lay down a different rule by legislation, and should be permitted the opportunity to consider whether to do so.

To date, however, none of these proposals has been enacted, and the sense of the Congress appears instead to be that habeas law does not require any dramatic overhaul at the moment.[7] The House bill, sponsored by Representative Edwards, was voted out of committee earlier this year, but has not yet proceeded any further. The House Judiciary Committee report on H.R. 4018 confirms that the bill is not designed as a clarification or codification of *Brecht*, but instead to "restor[e] the traditional framework" as it existed prior to *Brecht*. H.R. Rep. No. 470, 103d Cong., 2d Sess. 14 (1994); *see also id.* at 29 (dissenting views of minority members) (purpose of proposed bill is to "overtur[n]" *Brecht*). The *Brecht* holding, once again, is described as providing that habeas relief should be denied "unless the petitioner can show that the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (*quoting Brecht*, 113 S. Ct. at 1718).

The argument here is *not* that the Court should infer from Congress' failure to act that it has somehow expressed its affirmative approval of the *Brecht* approach. *Cf. Brecht*, 113 S. Ct. at 1719. Instead, the point is simply that Congress has demonstrated its own recognition that this approach --

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[7] Considerable discussion occurred earlier in the session about including various components of habeas reform in the omnibus crime bill that is currently pending in conference committee. Upon further consideration, however, the leadership in both parties concluded that no measures affecting habeas corpus law should be included in that legislation, and no such provisions are contained in that pending proposal.

including its allocation of the burden of proof -- does govern in habeas actions, and Congress should be given a reasonable opportunity to assess the effects of that approach before deciding whether to legislate any change.

Unless the Court were to overrule *Brecht*, therefore, there is no obvious reason for this Court to abandon its conclusion about which party bears the burden of proof in federal habeas proceedings.[8] The burden properly rests on a habeas petitioner, seeking to overturn a presumptively valid state conviction, to show that any alleged error warrants reversal on collateral habeas review.

II. UNDER THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT*, THE BURDEN OF PROVING THAT ALLEGED ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" RESTS UPON THE PARTY SEEKING TO SET ASIDE THE JUDGMENT ON APPELLATE REVIEW

In *Brecht*, the Court noted that it was adopting the *Kotteakos* test in part because "federal courts may turn to an existing body of case law in applying it." 113 S. Ct. at 1722. Petitioner is studiously silent, however, on what that body of case law says about the issue raised in this case, other than to place emphasis on the now irrelevant criterion of how this inquiry was previously handled under the *Chapman* approach, which was expressly rejected in *Brecht*.

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[8] Many of the arguments marshalled by Petitioner here really go to the antecedent issue of whether the *Kotteakos* standard is proper on collateral habeas review at all, which was already determined in *Brecht*; they thus tend to be a reprise of the arguments made and rejected by the petitioner in *Brecht*. *Compare, e.g.*, Brief for Petitioner at 12-13, 15-19, 37-39 *with Brecht*, 113 S. Ct. at 1716.

Brief for Petitioner at 15-19.[9] When the background and progeny of *Kotteakos* are examined closely, however, the rectitude of the burden-of-proof holding in *Brecht* is established even more plainly.

A. The Historical Background to Federal Appellate Review of Trial Judgments

The history of appellate review leading up to *Kotteakos* evinces a long struggle between the legislatures and the courts over when errors alleged to have occurred at trial should be understood to warrant relief from an otherwise valid judgment. In the English criminal courts, the "doctrine of presumed prejudice" was first announced "in that most technical of courts, the Court of Exchequer, about 1835," and was adopted more widely in the decades thereafter, including in this country. Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 147 (1927), cited in *Kotteakos*, 328 U.S. at 759 n.12. This "paralyzing rule" was abolished in England in 1873 by the Judicature Act, with the result that in the King's Bench Division only very rare cases were reversed for error. *Id.* It was attacked much more slowly in this country, however, and "in the federal courts it continued to obstruct the administration of justice until 1919, when Congress abolished it by an act," which corresponds to the current 28 U.S.C. §2111. *Id.*[10] The common-law approach to reversing

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[9] Instead, Petitioner engages in an unwarranted attack on "two decades worth of [unnamed] decisions of this Court" addressing various habeas issues, an attack that does not merit any response here. Brief for Petitioner at 35.

[10] The statute as enacted in 1919 was codified at 28 U.S.C. §391, *see Kotteakos*, 328 U.S. at 757, and has since been repealed and reenacted as section 2111, with the omission of the adjective "technical" to describe more broadly the errors it addresses. *See Brecht*, 113 S. Ct. at 1718 n.7.

judgments on appeal thus was sharply repudiated both in England and in the United States by statutory enactment.

There is good reason to believe, moreover, that the more exacting approach taken in England was never well suited here, since it evolved as a humanitarian response to a harsh criminal law without procedural protections:

> In 1821, the French Government sent a distinguished lawyer, M. Cottu, to England, to study their criminal system. He reported that the English penal law was written in letters of blood, that nearly every offense presumed the death of the offender. Consequently there had arisen a "humane conspiracy" between judges, lawyers, juries, rules of practice and procedure to defeat the law and to acquit the prisoner.
>
> . . . .
>
> The existence of that "humane conspiracy" never found the slightest justification in America. Our penalties were never severe nor our forms of trial unfavorable to the prisoner.

Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 220 (1925), cited in *Kotteakos*, 328 U.S. at 759 n.13. Thus the enactment of a repudiating federal statute in 1919, and the adoption of similar measures in many of the States, was long overdue. Even so, while "some of [that discredited system] has been taken away by statutes, yet the courts of this country have still in themselves much of that ancient, inherent power necessary to effect this reform." *Id.*

The federal courts implemented this statute with fidelity to its main purpose, and thus the decisional law reflected a new refusal to presume prejudice from alleged error.

Instead, the courts put the burden on criminal appellants to demonstrate that alleged error had affected their substantial rights. As one court summarized in a case involving alleged error in admitting certain evidence, defendants were now obligated by law to bear this burden:

> From recent legislation [citation] we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now *to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right* whereby he has been prevented from having a fair trial.

Haywood v. United States, 268 F. 795, 798 (7th Cir. 1920) (emphasis added), *cert. denied*, 256 U.S. 689 (1921). *See also Armstrong v. United States*, 16 F.2d 62, 64 (9th Cir. 1926) (rejecting claimed error in admitting evidence alleged to have been unlawfully seized because defendant "has not shown that he was denied a 'substantial right'"), *cert. denied*, 273 U.S. 766 (1927).

In a later case involving alleged errors in the cross-examination and jury instructions, the court similarly noted the change that had been wrought by the 1919 statute: "Under the law as now declared, 'the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless is changed, and *the burden now is on the complaining party to show from the record as a whole the denial of some substantial right.*'" *Morgan v. United States*, 98 F.2d 473, 477 (8th Cir.) (emphasis added) (quoting and citing numerous decisions), *cert. denied*, 305 U.S. 648 (1938). *See also Valli v. United*

States, 94 F.2d 687, 690 (1st Cir.) (rejecting claim of error in admitting evidence allegedly obtained by illegal wiretap because "defendants have failed to sustain" their burden of showing that their "substantial rights were affected by the introduction of this evidence"), *cert. dismissed*, 304 U.S. 586 (1938).

The Supreme Court also addressed the effect of the statute in a decision that was relied on by the Court in *Kotteakos* itself. *See Kotteakos*, 328 U.S. at 756-57. In *Berger v. United States*, 295 U.S. 78 (1935), the Court confronted a situation where a variance in proof occurred between the defendant's indictment and conviction. The Court noted that under the 1919 statute, the question was whether the variance was great enough to "'affect the substantial rights' of the accused." *Id.* at 82. The Court explained:

> Evidently Congress intended by the amendment to section 269 [now 28 U.S.C. §2111] to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless.

Id. (*citing with approval Haywood, supra; Rich, supra*).

Yet another decision correctly noted the true breadth of the federal statute, which applies not only to criminal cases but to civil cases as well. In *Shuman v. United States*, 16 F.2d 457 (5th Cir. 1927), the court held that any error that might have arisen from a challenged jury instruction did not have any prejudicial effect upon the defendant, who was convicted of receiving stolen property. The court put its

ruling on the basis of the federal statute: "It has been held that this statute casts the burden upon the plaintiff in error [appellant], in either a civil or criminal case, of showing prejudicial error from the whole record." *Id.* at 458.

This asserted breadth of the federal statute was confirmed by the Supreme Court in *Palmer v. Hoffman*, 318 U.S. 109 (1943), a civil case that stemmed from a railroad accident. The appealing party contended that an evidentiary ruling by the trial court constituted reversible error. The Court stated that it did not need to determine whether the ruling was error, because in any event it had not been shown to have affected the complainant's substantial rights. *Id.* at 116. In so concluding, the Court cited the federal statute (then 28 U.S.C. §391) and held that *it imposed the burden of proof upon the complaining party*: "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners." *Id.*

Moreover, just three years before *Kotteakos* itself was decided, and in the same year as *Palmer*, the Supreme Court decided a pair of cases on habeas review in which the burden of showing a violation of substantial rights was squarely placed upon the habeas petitioner. In *Adams v. United States*, 317 U.S. 269 (1943), the Court rejected a claim that the defendant was entitled to habeas relief because his jury trial rights had been violated in his federal trial. The Court said, through Justice Frankfurter: "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Id.* at 281. A few months later, in a case that arose on federal habeas review of a state conviction for alleged error in

prosecutorial comment, the Court denied relief, quoting this same statement. *Buchalter v. New York*, 319 U.S. 427, 431 (1943).

Thus, far from there being an established history prior to *Kotteakos* that the government bears the burden of proof on the issue of whether alleged error affected substantial rights, the main thrust of the actual decisional law is to the contrary. The older and overly fastidious common-law tradition was directly overridden in 1919 by the new federal statute, and the courts faithfully applied that statute in civil and criminal cases alike. Under this new approach, in both civil and criminal cases, the courts required parties seeking to set aside judgments on appeal to show that alleged error had affected their substantial rights before granting them any relief.

B. The Decision and Rationale in *Kotteakos*

In *Kotteakos* itself, the Court construed the federal statute, then codified at 28 U.S.C. §391, in determining what standard of review should be applied on appeal to claims of error. The essence of the *Kotteakos* test, as adopted by the Court in *Brecht*, required a determination of whether "the error had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776.[11]

The Court reached this conclusion by applying the plain terms of the federal statute, which then provided: "On the

[11] *Kotteakos* also answers a further question that could be raised about application of this standard as adopted in *Brecht* -- what degree of confidence must a court have that the standard as formulated has been met. In *Kotteakos*, the Court concluded that it was "highly probable" that alleged error had such "substantial and injurious effect" on the jury's verdict. 328 U.S. at 776.

hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *Kotteakos*, 328 U.S. at 757. By its terms, the statute thus was framed in the affirmative, dictating that alleged error was to be disregarded unless it was demonstrated to have "affect[ed] the substantial rights of the parties." This phrasing comported with the purpose of the statute, as described above, which was to rid the courts of the presumption that alleged error should lead to reversal of otherwise valid judgments. Or, as the Court paraphrased the statute, it "comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.'" *Id.* at 760.

In arriving at this approach, the Court in *Kotteakos* referred also to the legislative history underlying the federal statute. It quoted from the congressional committee report that the purpose of the bill "in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.'" 328 U.S. at 760 (*quoting* H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1946)). This same purpose is shown even more clearly on the next page of the same committee report, where the report compares two inconsistent Supreme Court decisions in civil cases on the burden-of-proof issue. The report strongly states that this burden is to be borne by the party seeking to set aside the judgment below:

> "In other words, in the first of these cases the Supreme Court holds that an error is presumed to be

> prejudicial until the contrary appears, and in the second that an error is presumed to be harmless until the contrary is made to appear. It is the purpose of the first section of the present bill to enact, in so far as the appellate courts are concerned, that in the consideration in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party."

H.R. Rep. No. 913, *supra*, at 2 (*quoting* H.R. Rep. No. 611, 62d Cong., 2d Sess. 2 (1912)).

This statement captures the essence of the effect of the federal statute. It also accords with statements in the committee reports that accompanied the first version of the same proposed statute, which quoted from an article by President Taft: "'No judgment of the court below should be reversed except for an error which the court, after hearing the entire evidence, can affirmatively say would have led to a different result.'" H.R. Rep. No. 1949, 61st Cong., 3d Sess. 1 (1911) (*quoting* William Howard Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 16 (1905)). Similarly, the description of this measure given earlier by the Chairman of the Senate Judiciary Committee, Senator Elihu Root, stated that it was designed "to provide that a judgment or decree shall not be reversed for error which does not do a substantial injury to the complaining party." 48 Cong. Rec. 11,770 (1912).

The Court in *Kotteakos* also drew from the legislative history the suggestion that two different categories of rights might be alleged as error under this statute. One category of error is of such a character that its natural effect may or may

not be "to prejudice a litigant's substantial rights." For such errors, described by the Court as "technical," the burden falls upon the complaining party to show that the result of the error was to affect "his substantial rights." 328 U.S. at 760 (*quoting* H.R. Rep. No. 913, *supra*). A second category of error comprises those where the "natural effect is to prejudice a litigant's substantial rights." For these errors, the "burden of sustaining a verdict" would rest upon the opposing party "notwithstanding this legislation." *Id.*[12]

A question posed by Justice Stevens in his concurrence in *Brecht* concerns the kinds of error that are properly understood to fall in these two categories identified in *Kotteakos*, as applied on federal habeas review. As the Court noted in *Brecht*, the term "technical" was subsequently deleted from the statute, as it now appears at 28 U.S.C. §2111.[13] 113 S. Ct. at 1718 n.7. Thus there remains no ground under the statute, if any ever existed, to hold that these categories should be understood to correspond, respectively, to "hypertechnical" errors as opposed to "ordinary" errors. Instead, if these two categories are to be carried forward at all, they would appear to correspond most sensibly to the two categories of error the Court has discussed extensively in recent cases: "trial errors," which are subject to harmless error analysis, and "structural

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[12] As Justice Brennan later characterized the same materials: "The theme that reversal be limited to prejudicial errors is found throughout the legislative history." *United States v. Lane*, 474 U.S. 438, 458 (1986) (Brennan, J., concurring and dissenting in part).

[13] The statute now reads, more simply: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. §2111. It thus remains phrased in the affirmative, that courts are to disregard alleged error unless it affects "substantial rights."

defects," which require reversal of the conviction if they are established by the defendant and not dispelled by the government. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991); *see also Brecht*, 113 S. Ct. at 1722; *cf. id.* at 1723 (Stevens, J., concurring).[14]

The remainder of the Court's opinion in *Kotteakos* consists of a thoughtful and extensive exposition of how reviewing courts should approach the task of determining whether alleged error had a "substantial and injurious effect" on the jury's verdict. The distinction between stepping into the jury's shoes to assess guilt and deciding whether the jury's verdict was affected by alleged error is carefully explained. The duty to make this assessment in view of the entire trial record, as specifically enjoined by the statute, is also explored. 328 U.S. at 761-66. That the determination is emphatically for a court to make in the exercise of its own judgment, taking account of whatever may be shown and said on the subject by both parties to the case, is also made plain. *Id.* The *Kotteakos* decision, as a result, has been extensively cited for its guidance on the question of how courts should carry out their duty to assess whether alleged error warrants reversal of an otherwise valid judgment.

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[14] In *Brecht*, Justice Stevens suggested that all constitutional errors must be assessed under *Kotteakos* with the government bearing the burden of proof. 113 S. Ct. at 1723-24 (Stevens, J., concurring). Of course, constitutional errors historically have not been subject to such analysis under *Kotteakos*, since the courts have applied the *Chapman* standard to them instead on direct review. *See id.* at 1718 (majority opinion). Thus, the issue raised in *Brecht* required the Court to exercise judgment in determining how best to fill "the gaps of the habeas corpus statute" by determining "whether the proposed rule would advance or inhibit" the "considerations underlying our habeas jurisprudence." *Id.* at 1719. And it was the Court's assessment of these considerations in *Brecht* that caused it to reject the *Chapman* standard for cases on habeas review.

C. Subsequent Application of *Kotteakos*

The courts have since applied *Kotteakos* in accordance with this historical understanding of the consequences of the federal statute now codified at 28 U.S.C. 2111.

In the wake of *Kotteakos*, courts continued to understand that the federal statute put the burden on the appealing party to show that alleged error affected his substantial rights in order to justify reversal. *See, e.g., Baker v. United States*, 156 F.2d 386, 389 (5th Cir.), *cert. denied*, 329 U.S. 763 (1946); *Myres v. United States*, 174 F.2d 329, 332 (8th Cir.), *cert. denied*, 338 U.S. 849 (1949); *Pulley v. United States*, 253 F.2d 796, 798 (8th Cir. 1958); *United States v. Montoya*, 827 F.2d 143, 154 (7th Cir. 1987). One court put this approach in context of the maxim "Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium" -- that all things are presumed to have been rightly and duly done until the contrary is proved. *Wells v. United States*, 158 F.2d 932, 935 (5th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). In many other cases, the courts performed their careful examination of whether claims of error affected substantial rights, as required by the statute, without discussing which party bore the burden of proof under *Kotteakos*.

In *United States v. Lane*, 474 U.S. 438 (1986), the Court confirmed this approach. Addressing alleged error involving improper joinder of defendants, the Court found that any such error would not require reversal of the conviction unless it were shown that it had "any 'substantial influence' on the verdict." *Id.* at 450 (*quoting Kotteakos*, 328 U.S. at 765). "Invoking the *Kotteakos* test, we hold that an error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in

determining the jury's verdict.'" *Id.* at 449 (*quoting Kotteakos*, 328 U.S. at 776). Undertaking this analysis, the Court concluded that the claimed error did not justify reversal of the conviction. *Id.; see also id.* at 459 (Brennan, J., concurring and dissenting in part) ("We held instead [in *Kotteakos*] that the Act's command to disregard errors unless they 'affect the substantial rights of the parties' was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that an error may have had 'substantial influence' on the outcome of the proceeding").

In civil cases, the proposition that the statute imposes the burden on the complaining party to show that alleged error has affected substantial rights is widely accepted. In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), the Court observed that "[w]e have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered 'citadels of technicality.'" *Id.* at 553 (*quoting Kotteakos*, 328 U.S. at 759) (internal quote omitted). The federal statute embodies the principle that courts should "ignore errors that do not affect the essential fairness of the trial." *Id.* (*citing Kotteakos*, 328 U.S. at 759-60). In *McDonough*, therefore, the Court reversed an order granting a new trial and held that the complaining party should be required to demonstrate that an error that arose on voir dire actually affected its substantial rights. 464 U.S. at 555-556.

The same application of section 2111 has been made in numerous other civil cases. *See, e.g., Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987) (appealing party must show he was prejudiced by alleged error); *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975) (error not reversible where objecting party did not show it affected substantial rights); *Cunningham v. Mitchell*,

374 F.2d 356, 359 (5th Cir. 1967) (same); *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422, 428 (8th Cir. 1964) (same); *Segal v. Cook*, 329 F.2d 278, 280 (6th Cir. 1964) (same).

The case law thus again demonstrates that before and after *Kotteakos*, in both criminal and civil cases, the courts generally have understood the federal statute now codified at 28 U.S.C. §2111 as being consistent with *Brecht* on the burden-of-proof issue. The courts thus have interpreted and applied the statute as directing them to place upon the party seeking reversal the burden of showing that alleged error had such a substantial and injurious effect on the jury's verdict as to justify setting aside the judgment.

III. THE *KOTTEAKOS* TEST ADOPTED IN *BRECHT* IS APPROPRIATE ON COLLATERAL FEDERAL REVIEW OF STATE JUDGMENTS BECAUSE IT REQUIRES THE HABEAS PETITIONER TO SHOW THAT ALLEGED ERROR JUSTIFIES REVERSAL OF THE CONVICTION

In *Brecht*, the Court stressed that the *Kotteakos* standard, including its allocation of the burden of proof to the party seeking to set aside the judgment, was better suited to federal habeas review than the more demanding *Chapman* approach. 113 S. Ct. at 1718-22. This is true for reasons that arise from the specific nature of federal habeas corpus actions involving collateral review of state convictions under 28 U.S.C. §2254. In such proceedings, it is proper that a habeas petitioner bear the burden of proof to establish that alleged error affected his substantial rights in order to justify reversal of his conviction.

A. Habeas Corpus Review Under Section 2254 Occurs in a Civil Action and Thus It Is Proper for Petitioner to Bear the Burden of Showing that the Conviction Warrants Reversal

One reason why the burden of proof must be borne by the petitioner on federal habeas review under *Brecht* is that such review occurs in a civil proceeding. Actions brought under 28 U.S.C. §2254 have long been recognized as civil in nature, even though they involve collateral review of state criminal convictions. *See, e.g., Fisher v. Baker*, 203 U.S. 174, 181 (1906); *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 269 (1978); *cf. Teague v. Lane*, 489 U.S. 288, 308-09 (1989) (citing civil cases on retroactivity issue). And in civil actions brought in the federal courts, perhaps even more clearly than in criminal cases, the burden of proof to show that alleged error warrants setting aside an otherwise valid judgment rests upon the complaining party. *See Palmer v. Hoffman*, 318 U.S. at 116; *see also* Sections IIA & IIC, *supra* (citing cases).

In *Harris v. Nelson*, 394 U.S. 286 (1969), the Court considered the extent to which federal habeas corpus proceedings, as civil actions, are governed by the Federal Rules of Civil Procedure. In that case, a state prisoner sought to use the instrument of interrogatories for discovery purposes in his habeas lawsuit. The Court held that under the version of the Federal Civil Rules in effect at that time,[15]

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[15] At the time of the *Harris* decision, Federal Civil Rule 81(a)(2) provided that the Civil Rules were not applicable in habeas corpus actions except where they "heretofore conformed to the practice in actions at law or suits in equity." 394 U.S. at 292-93. During the pendency of that case, Rule 81 was amended to frame the matter in the affirmative -- (continued...)

it lay within the trial court's discretion to decide what procedures should be extended in such cases to allow development of the facts relevant to disposition of the habeas petition. *Id.* at 292-300.

After *Harris* was decided, this Court proposed new rules to govern habeas proceedings brought in the federal courts under 28 U.S.C. §2254. Those rules were approved as amended by the Congress and became effective February 1, 1977. Under these rules specific to habeas cases brought under section 2254, the "Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these [section 2254] rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254. This rule has been construed to require the federal courts to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions, absent some specific provision to the contrary. *See, e.g., Browder*, 434 U.S. at 269-71 (rejecting contention that Federal Civil Rules do not apply on habeas and holding specifically that Civil Rules 52 and 59 are applicable); *McDonnell v. Estelle*, 666 F.2d 246, 249 (5th Cir. 1982) (applying Civil Rules 12 and 56). *See also Frady*, 456 U.S. at 183 (Brennan, J., dissenting) (noting that section 2254 rules authorize courts to apply Federal Civil Rules in such cases).[16]

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[15](...continued)
"These rules are applicable to proceedings for ... habeas corpus" -- though the Court in *Harris* noted that this change was not intended to be one of substance. 394 U.S. at 293 n.3.

[16] In his *Frady* dissent, Justice Brennan noted that the section 2254 rules differ from the section 2255 rules in that the former specifically provide that section 2254 cases are to be governed by the Federal Civil Rules only, whereas the latter permit application of either the Federal (continued...)

Under Federal Civil Rule 61, however, "no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict ... or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Rule 61 goes on to direct the courts, in language similar to 28 U.S.C. §2111, that they "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *Id.* The Court has previously held that Rule 61 applies not only to federal trial courts, but that "it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough*, 464 U.S. at 554.

In civil cases, the federal courts have clearly held that the party seeking to invalidate a judgment bears the burden of proving that alleged error affected his substantial rights such as to justify reversal. *See, e.g., Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. 1981) ("party asserting error has the burden of proving that 'substantial rights' were affected" by the error; *citing Kotteakos*); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) (same; jury instruction), *cert. denied*, 450 U.S. 921 (1981); *Westwood Chem., Inc. v. Owens-Corning Fiberglas Corp.*, 445 F.2d 911, 918 (6th Cir. 1971) (same), *cert. denied*, 405 U.S. 917 (1972); *Creekmore v. Crossno*, 259 F.2d 697, 698 (10th Cir.

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[16](...continued)
Civil Rules or the Federal Criminal Rules in section 2255 cases. 456 U.S. at 182-83 (Brennan, J., dissenting). For this reason, the dictum in *United States v. Olano*, 113 S. Ct. 1770 (1993), concerning harmless-error analysis under Federal Criminal Rule 52, does not apply in cases like *Brecht* and the instant case. In addition, it does not apply because the Court has explicitly refused to apply Federal Criminal Rule 52 to cases brought on collateral habeas review. *See Frady*, 456 U.S. at 163-66 (majority opinion).

1958) (same; *citing Palmer v. Hoffman*). Thus, even if *Brecht* is construed as having held merely that the *content* of the *Kotteakos* standard is to be applied on federal habeas review -- divorced from any determination of the proper allocation of the burden of proof--the proper approach in cases brought under section 2254 is to require the complaining party to bear the burden of proof in accordance with Federal Civil Rule 61.

The more general point here, of course, is that since habeas proceedings under section 2254 are civil actions, it is natural for the plaintiff in such actions to bear the burden of proof on all the issues that must be shown in order to prove his claim. This approach has been taken in numerous decisions. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). In particular, however, it is appropriate for the habeas petitioner to bear this burden under the longstanding principle that the party "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer*, 318 U.S. at 116; *see also Kotteakos*, 328 U.S. at 776.

B. The Nature and Purpose of Collateral Habeas Corpus Review Warrants the Application of Different Rules than on Direct Review

Even more important, the nature of federal habeas actions brought under section 2254 is that they involve collateral federal review of state convictions. As the Court emphasized in *Brecht*, as well as in many other decisions, these proceedings raise special concerns that justify the application of different rules and procedures than may obtain on direct review. This point, indeed, was the foundation of the Court's determination in *Brecht* that the *Kotteakos* standard

should apply on collateral habeas review rather than the *Chapman* standard that applies on direct review. That judgment is sound, and it also dictates that the burden of proof under this standard is properly borne by the petitioner on collateral habeas review.

That the burden of proof rests upon the petitioner in habeas actions follows most logically from the fact that the petitioner is attacking "the judgment of a court," which "carries with it a presumption of regularity." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) ("burden of proof rests upon [petitioner] to establish that he did not" waive right to counsel); *see also Hawk v. Olson*, 326 U.S. 271, 279 (1945) ("Petitioner carries the burden in a collateral attack on a judgment."). "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 113 S. Ct. at 1720. *See also* Larry W. Yackle, *Postconviction Remedies* §133, at 502-03 (1981) ("the moving party in collateral proceedings of any stripe bears the burden of showing an entitlement to relief" because presumption of regularity attaches to criminal convictions affirmed on direct review).

This finality interest goes not only to the deterrent effect of the criminal laws, *see, e.g., Teague*, 489 U.S. at 309, but also to the prospect that a convicted defendant will be willing to undertake rehabilitation, *see, e.g., Engle v. Isaac*, 456 U.S. at 127 n.32. As the late Professor Bator eloquently described in a famous article on habeas review:

> I suggest that finality may be a crucial element of this effectiveness [of the substantive commands of the criminal law]. Surely it is essential to the educational and deterrent functions of the criminal law that we be

> able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment.... Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction that he stands in need of rehabilitation....

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963) (quoted in *Engle*, 456 U.S. at 127 n.32); *see also Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

In addition, inroads on finality tend to foster a general disrespect for the legal system and to undermine confidence in its efficacy, which is undesirable. *See, e.g., Addonizio v. United States*, 442 U.S. 178, 184-85 (1979). As Judge Friendly commented:

> The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving .... His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons.

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970) (quoted in *Engle*, 456 U.S. at 126 n.31).

To take account of these concerns about the finality of state judgments, the Court has held that it is appropriate to apply different rules on collateral review than apply on direct review. Indeed, the standards applied on direct review may be simply "out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *Frady*, 456 U.S. at 164.

Similarly, the Court has stressed that comity and federalism concerns arise with habeas petitions brought under section 2254. "'The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Brecht*, 113 S. Ct. at 1720 (*quoting Engle*, 456 U.S. at 128). And "nowhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice." *Younger v. Harris*, 401 U.S. 37, 44 (1971). These concerns provide further reason to apply different rules in such cases than would be applied on direct review.

Finally, the application of rules that encourage more liberal allowance of the writ on collateral review "degrades the prominence of the trial itself," *Engle*, 456 U.S. at 127, and reduces it from its proper place in the justice process as the "'main event' and not a 'tryout on the road' for what will

later be the determinative federal ... hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). It also imposes concomitant costs upon society because belated orders granting new trials are often tantamount to outright reversals:

> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Engle, 456 U.S. at 127-28; *see also United States v. Mechanik*, 475 U.S. 66, 72 (1986).[17]

For these reasons, "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Frady*, 456 U.S. at 165 (*quoting Addonizio*, 442 U.S. at 184). Yet these concerns are best addressed in collateral habeas corpus actions by adhering to the *Brecht* approach, which differentiates between direct and collateral review in determining the question of whether alleged error "had substantial and injurious effect" on the jury's verdict. "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless

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[17] Interestingly enough, the same point was made on the floor of the Senate during one of the early debates on the proposal that became the predecessor statute to 28 U.S.C. §2111: "When the cases are disposed of by a jury and by a judge and substantial justice has been accorded they should not be reopened and protracted until the evidence is dissipated and the witnesses are dead, and the most flagrant criminals, in many instances, go unwhipped of justice." 48 Cong. Rec. 11,774 (1912) (statement of Sen. Poindexter).

they can establish that it resulted in 'actual prejudice.'" *Brecht*, 113 S. Ct. at 1722.

Considered from a somewhat different standpoint, the *Kotteakos* standard -- including its allocation of the burden of proof to the habeas petitioner -- is again the appropriate approach in cases like this one which involve alleged trial error. In a number of cases, Justice O'Connor has stated her view that "the central goal of the criminal justice system [is] accurate determinations of guilt and innocence," *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting), and thus the principal focus on federal habeas review of state convictions should be to assure "the reliability of the criminal process," *id.* at 1728-29. The dispositive issue can thus be framed as whether alleged error "actually affected the reliability of the trial," *id.* at 1730, or, to put it another way, whether alleged error "may have caused the conviction of an actually innocent person," *id.* at 1729. *See also Withrow v. Williams*, 113 S. Ct. 1745, 1757 (1993) (O'Connor, J., concurring and dissenting in part) ("ultimate equity on the prisoner's side" is "a sufficient showing of actual innocence"); *Engle*, 456 U.S. at 132 (legal principles "must yield to the imperative of correcting a fundamentally unjust incarceration").

This interest in assuring the reliability of the criminal process is directly advanced by application of the *Kotteakos* standard on collateral habeas review. That standard, once again, requires a reviewing court to consider whether alleged error -- here constitutional trial error -- "had substantial or injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1714, 1716, 1722. If such error cannot be shown, after careful review of the entire trial record, to have had any such "effect or influence in determining the jury's verdict," then the reliability of the criminal process will not be served by reversing the conviction. If no such showing can be made, then there can

be no serious apprehension that the alleged trial error "caused the conviction of an actually innocent person." *Id.* at 1729 (O'Connor, J., dissenting).[18]

Habeas relief would not be warranted in such instances because they reveal no "extreme malfunctions in the state criminal justice system" that have "grievously wronged" the petitioner. 113 S. Ct. at 1730 (O'Connor, J., dissenting). To require more would be to repudiate all confidence in the ability of state courts in good faith "to honor constitutional rights." *Engle*, 456 U.S. at 128. This is especially true, moreover, as the habeas petitioner already will have had one or more full and fair opportunities to relitigate his claims in the state courts, with the State obliged to satisfy the more stringent *Chapman* standard in order to uphold the conviction on direct review.[19]

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[18] Instead, the granting of habeas relief many years after conviction -- here, *fourteen* years -- in such circumstances will, if anything, be viewed as a "stroke of lightning" bearing no relation to the jury's verdict and having no effect upon state policy, prosecutorial conduct, or judicial practice. *Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring).

[19] Petitioner's contention that the *Brecht* standard, including its allocation of the burden of proof, collapses into the same "cause and prejudice" standard that is applied in cases of procedural default or abuse of the writ is truly bizarre. Brief for Petitioner at 39-42. The "cause and prejudice" standard is emphatically framed in the conjunctive, and requires a habeas petitioner to show not only that some "external impediment" has prevented him from raising a claim previously, *Murray v. Carrier*, 477 U.S. 478, 494 (1986), but that alleged error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," *Frady*, 456 U.S. at 170. Needless to say, this standard is much more exacting than the *Kotteakos* approach adopted in *Brecht*.

Thus, the *Brecht* approach -- including its allocation of the burden of proof to the habeas petitioner to show that alleged error "had substantial and injurious effect" on the jury's verdict -- is proper here.[20] It will be met by petitioners who can satisfy any of the following criteria: (1) show alleged trial error that had "substantial and injurious effect or influence in determining the jury's verdict"; (2) show a "structural defect" of the kind that undermines the very integrity of the trial proceedings; or (3) show actual innocence. This approach is in harmony both with the aim of assuring "the reliability of the criminal process," *Brecht*, 113 S. Ct. at 1728-29 (O'Connor, J., dissenting), and with "the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal," *Frady*, 456 U.S. at 166.

C. The Traditional Safeguards Noted in *Brecht* Suffice to Protect the Historical Role Fulfilled by the Writ of Habeas Corpus

It bears emphasis, once again, that the issue of which party bears the burden of proof in applying the *Brecht* standard on cases of collateral habeas review is accompanied by other specific procedural protections emphasized by Justice Stevens in his *Brecht* concurrence. These features of the *Kotteakos* test substantially protect the interests of the party seeking to set aside a presumptively valid judgment.

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[20] *See also* Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* §13.10, at 13-59 (2d ed. 1992) ("burden of proof [on harmless error issue] is on the prisoner-petitioner to show that but for the alleged error, she would not have been convicted"); *id.* at 13-60 ("In habeas actions, by statute, the burden rests upon the petitioner to show that the error was conspicuously prejudicial.").

First, the petitioner already will have had the opportunity to have all claims considered under the more stringent *Chapman* standard on direct review. "State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error." *Brecht*, 113 S. Ct. at 1721. The performance of this duty by the state courts on direct appeal, along with the possibility of review by this Court, is a significant safeguard.

Second, and of "particular importance," the *Brecht* standard requires the federal courts assessing habeas claims on collateral review to consider alleged error "in the context of the entire trial record." 113 S. Ct. at 1724 (Stevens, J., concurring). In so doing, the federal courts are held to the responsibility of making a *de novo* examination of the trial record to determine the effect of the alleged error, as the Court did in *Brecht* itself. *Id.* The lower courts appear to have been responsive to this admonition as now reiterated in *Brecht*. *See* Part IB, *supra* (citing cases).[21]

Third, *Brecht* reminds the lower courts that they are to apply the *Kotteakos* standard in accordance with its emphasis on determining what effect the alleged error had upon the jury. They thus are obliged to do more than make a simplistic assessment of probable guilt. 113 S. Ct. at 1724 (Stevens, J., concurring). Evidence of the petitioner's guilt

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[21] The post-*Brecht* decisional law also belies Petitioner's contention that application of the *Brecht* standard will complicate the resolution of claims and impose greater burdens on the courts. Brief for Petitioner at 36-38. On the contrary, the duty imposed on the courts is precisely what it was before *Brecht*: to assess the validity of claims raised in the context of the entire trial record, as both parties presumably present their most persuasive reasons why the reviewing court should hold in their favor.

remains very relevant, certainly, because "weighty" evidence of guilt would tend to suggest that alleged error did not have "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722 (majority opinion). But the reviewing court's role is to exercise careful judgment in accordance with the standard as formulated in *Kotteakos* and adopted in *Brecht*, rather than seeking to usurp the jury's proper role.

These protections amply suffice to vindicate the historical role fulfilled by the writ of habeas corpus. But the application of the *Kotteakos* standard on habeas review is also consonant with those same principles, as is allocation of the burden of proof to the petitioner who seeks to set aside a presumptively valid state conviction on collateral review.

IV. THE ERRORS ALLEGED BY PETITIONER IN THIS CASE DID NOT HAVE "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT" SO AS TO ENTITLE HIM TO FEDERAL HABEAS RELIEF FROM HIS STATE CONVICTIONS

In this case, the court below determined that the errors alleged by Petitioner, even assuming *arguendo* that they "could be said to have abridged petitioner's constitutional rights," were not "of such magnitude that they 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal*, 3 F.3d at 147 (*quoting Brecht*, 113 S. Ct. at 1722). This statement, which represents the court's considered judgment on this issue in the context of the entire trial record, is not framed in such a way as to be dependent upon the allocation of the burden of proof. Be that as it may, however, the court's conclusion is also correct on the record here.

The court below noted that the actual instructions given to the jury at Petitioner's trial were in accord with prevailing Ohio criminal law and thus did not constitute error. 3 F.3d at 147 n.2 (here "the jury charge provided an adequate statement of the way an aider and abettor's intent may be inf- .ed in Ohio"). In particular, the court applied the controlling standard laid down in recent cases to hold that "petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill." *Id.* at 147; *see Estelle v. McGuire*, 112 S. Ct. 475, 482 & n.4 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990).[22] Consequently, the court did not engage in a *Brecht* analysis on the issue of the jury instructions alone.

Instead, the court went on to consider whether the jury instructions, taken in combination with an improper comment made by the prosecutor in closing argument, violated Petitioner's constitutional rights. The narrow proposition considered by the court was whether their cumulative effect would have so confused the jury about whether a finding of intent was needed to convict Petitioner as to have "'substantial and injurious effect or influence in determining the jury's verdict.'" 3 F.3d at 147 (*quoting Brecht*, 113 S.

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[22] Petitioner contended that one isolated passage in the jury instructions, which described the necessity of finding specific intent "in the mind of the defendants or co-defendants or aiders and abettors, if you so find," would have misled the jury into concluding that it did not have to find specific intent in order to return a conviction on the charges against Petitioner. The court saw this passage as "nothing more than an unartful boilerplate repetition that the same individuals could be found guilty *either* as principals ('defendants or co-defendants') or as 'aiders and abettors,'" especially in view of three different statements in the instructions that the jury had to find the elements of each crime separately for each defendant. *O'Neal*, 3 F.3d at 146.

Ct. at 1722). The court held that even assuming, *arguendo*, that Petitioner's assertions amounted to trial error, any such error "did not injuriously influence the jury's decision to convict petitioner as a principal." 3 F.3d at 147.

The court reached the correct conclusion under the *Brecht* standard. Although Petitioner continues to press his claim in this Court that the alleged errors relieved the State "of the burden of proving the intent element of each of the crimes charged," Brief for Petitioner at 6-7, a close review of the full record demonstrates that Petitioner is not entitled to habeas relief from his convictions on each of the charges -- aggravated murder, kidnapping, and aggravated robbery.[23]

The court below noted that Petitioner's essential claim is that the jury might have been confused by the alleged errors so as "to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal." 3 F.3d at 147. This was true, first, as to the aggravated robbery charge, for it was exhaustively established at trial that Petitioner exited his saloon with the decedent's personal effects only minutes after the decedent was brought there. It was true, also, as to the kidnapping charge, for the evidence showed that Petitioner helped plan the forcible detention of the decedent, that it occurred at his unlicensed saloon, that

[23] In what may be intended as an attempt to fit this case into the possible exception reserved in *Brecht* for "deliberate and especially egregious error," Petitioner attacks the prosecutor's performance as constituting alleged misconduct. Brief for Petitioner at 47-48. This attack, however, falls far short of making the requisite showing of a failure to preserve that fundamental fairness essential to the very concept of justice, *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974), and in any event this issue is not properly before the Court.

he possessed personal effects of the decedent, and that he sought to extort money for allegedly keeping charge of the decedent. J.A. 156.

And this point was true, finally, as to the aggravated murder charge, as the court below specifically observed, for:

> Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal.

3 F.3d at 147. The court could have pointed also to the conceded fact that the decedent was killed at Petitioner's saloon, Tr. 5841; J.A. 157, with a weapon that the evidence related only to Petitioner as among the co-conspirators, Tr. 4863-65, 4872, 4892, 4908, 4911-12, 4917-18, 4926; J.A. 45-51.

A review of the entire record thus clearly shows that Petitioner was presented to the jury strictly as a principal in these events. In addition, the evidence of guilt here "was, if not overwhelming, certainly weighty." *Brecht*, 113 S. Ct. at

1722.[24] Finally, the jury heard Petitioner's own theory of the crimes, which was that the others had kidnapped and killed the decedent in Petitioner's saloon without his knowledge. Tr. 5840-43; J.A. 160-61. This theory of total exoneration was not credible, however, in light of all the evidence that Petitioner was directly involved in the forcible detention of the decedent and was in possession of his personal effects just minutes after the decedent had arrived at Petitioner's saloon. J.A. 156.

Moreover, any potential for jury confusion here was minimal in view of the determination by the court below that the jury instructions viewed as a whole, though perhaps not ideal, were not even erroneous, but instead gave the jury "an adequate statement of the way an aider and abettor's intent may be inferred in Ohio." 3 F.3d at 147 n.2. The Court has cautioned that "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made," *Boyde*, 494 U.S. at 385, and "the respondent's burden is especially heavy [where] no erroneous instruction was given," *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). The court below was thus correct in concluding that "any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal." *O'Neal*, 3 F.3d at 147.

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[24] Again, the point of marshalling such evidence is not to suggest that a reviewing court should seek to supplant the jury's role in determining guilt, but to indicate further that the alleged error "did not 'substantially influence' the jury's verdict." *Brecht*, 113 S. Ct. at 1722.

CONCLUSION

For the foregoing reasons, the Court should continue to allocate the burden of proving that alleged error had substantial and injurious effect in determining the jury's verdict to the habeas petitioner on collateral review. In so ruling, the Court should affirm the judgment of the Sixth Circuit Court of Appeals in this case, which upheld Petitioner's state convictions for aggravated murder, kidnapping, and aggravated robbery.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISION AND RULES INVOLVED

(in addition to those set forth in the Brief for Petitioner)

28 U.S.C. Section 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

Rule 61 of the Federal Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.